Supreme Court of the United States

OCTOBER TERM 1949

No. 495

ANHEUSER-BUSCH, INCORPORATED,

Petitioner,

against

DU BOIS BREWING COMPANY,

Respondent.

REPLY OF PETITIONER TO RESPONDENT'S ANSWER TO PETITTIONER'S PETITION FOR REHEARING OF THE ORDER DENYING THE PETITION FOR CERTIORARI

Petitioner limits its Reply to two of the erroneous statements in Respondent's Answer:

I. **Respondent's Answer, page 2,** in referring to Petitioner's position with reference to the analysis of the *Orvis* v. *Higgins* [1] decision, states:

> "But the petitioner here does not contend either that this analysis is wrong at any point, or that, at any point, it creates any conflict either with the decision of this present case by the Court below, or with the decisions in other circuits."

The above quoted excerpt misstates Petitioner's position. The Petition for Rehearing of Order Denying Petition for Writ of Certiorari states:

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[1] 180 F. 2d 537 (C. A. 2, 1950).

At page 3 of the Petition:

"The majority decision in the *Orvis* v. *Higgins* case clearly is a modification of the statutory provision in Rule 52(a)."

And at page 4 of the Petition:

"The Advisory Committee's notes on the Rules make it clear that the *Princess Lida* doctrine, which in the past nine years has been a frequent cause of division in the Courts of Appeals, and the *Orvis* v. *Higgins* doctrine of graded findings, which may become a further ground for conflict, are modifications by judicial decision of the provisions of the Statute."

II. **Respondent's Answer, page 4, states:**

"Stating the matter as concisely as possible, it may be recalled here, as the evidence and the Trial Judge's findings show, that the respondent used 'Budweiser *simpliciter*' only under circumstances which excluded any possibility that the practice could create confusion between its 'Du Bois Budweiser' beer and petitioner's beer." [1]

The following unreversed findings of the District Court (Trial Judge) demonstrate the error in the above quoted excerpt from the Answer:

"37. Defendant usually invoiced its beer labeled 'Du Bois Budweiser' as 'Budweiser' or 'Bud'.

"38. In writing letters to defendant's salesmen, defendant's sales manager referred to its beer labeled 'Du Bois Budweiser' as 'Budweiser'.

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[1] Substantially the same statement appears on page 5 of the Answer, as follows:

"He (Trial Judge) refused to find the collateral fact now supposed and relied upon by the Petition for Rehearing: the supposed fact indispensable to the petitioner's argument, that in some other way the respondent's use of 'Budweiser' or of 'Budweiser *simpliciter*' had confused or deceived purchasers of beer." (Parentheses added.)

"39. Defendant's distributors, in many instances, invoiced defendant's beer labeled 'Du Bois Budweiser' as 'Budweiser' or 'Bud'.

"40. Many of defendant's wholesale distributors and retail dealers sold defendant's beer labeled 'Du Bois Budweiser' on calls for 'Budweiser' or 'Bud' without explanation.

"41. Members of the public, who for many years had believed the word 'Budweiser' was a brand name for a beer put out by Anheuser-Busch, ordered 'Budweiser' beer on draught and received beer from a tap on the handle of which were the words 'Du Bois Budweiser', which beer they believed to be plaintiff's.

"42. Members of the public, when receiving defendant's beer 'Du Bois Budweiser' on calls for 'Budweiser' draught beer were not likely to notice that the beer was taken from a tap labeled 'Du Bois Budweiser' or if they did notice such fact, nevertheless were likely to believe that the beer was plaintiff's beer." [2]

The District Court (Trial Judge) in its opinion states:

"And agents of defendant, seeking retailers as customers, were likely to, and in some cases have, suggested such substitutions as possible to their proposed customers." [3]

The petition for writ of certiorari should be reconsidered.

Respectfully submitted,

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MINTURN DE S. VERDI,
WALTER J. HALLIDAY,
Counsel for Petitioner.

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[2] R. 926a.
[3] R. 938a.